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Misc. No. 541

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

REUBEN L. DAVENPORT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Reuben L. Davenport, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 17,436 of that court, on June 22, 1967.

OPINION BELOW

The District Court entered an order overruling petitioner's motion for a new trial. This order, entered on June 14, 1966, has not been generally reported. A copy of the order of the District Court overruling the motion for a new trial is appended hereto as Appendix A.

The District Court entered judgment sentencing the petitioner to eighteen (18) months under each of counts one and three of the indictment, said sentences to run concurrently with each other.

The Opinion of the Court of Appeals is appended hereto as Appendix B.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on June 22, 1967. An order extending the time of file petition for writ of certiorari was entered on the 22nd day of July, 1967, granting petitioner additional time to and including August 21, 1967.

The jurisdiction to review the judgment is conferred on this Court by Title 28, U.S.C.A., §1254 (1).

THE QUESTION PRESENTED

1. Was the petitioner denied a fair trial by repeated comments and intrusions by the Trial Judge?

STATUTE INVOLVED

SALE OR RECEIPT OF STOLEN VEHICLES—Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, U.S.C.A., §2313

STATEMENT OF THE CASE

The petitioner was charged in two counts of a four count indictment, alleging violations of the provisions of Title 18, U.S.C.A., §2313. The first count alleged that on or about July 17, 1964, to on or about November 12, 1964, the petitioner did conceal and store and knowingly caused to be concealed and stored, a certain motor vehicle which was moving as and did constitute interstate commerce, to-wit: a 1962 Pontiac Bonneville two-door hardtop, bearing the concealed vehicle identification No. 862 D 9039, same having been transported from Huntsville, Alabama to Nashville, Tennessee, and knowing the same to have been stolen.

The petitioner moved the District Court for a judgment of acquittal at the conclusion of the government's proof, which motion was renewed at the conclusion of all the proof. These motions were overruled by the District Court.

The petitioner, thereafter, filed a motion for a new trial in the District Court in which he alleged:

1. There was not sufficient evidence presented by the government on which the jury could arrive at a verdict of guilty as to the defendant, Davenport, beyond a reasonable doubt.

2. The verdict is against the weight of the evidence.

3. The Court erred in not sustaining defendant Davenport's motion for a judgment of acquittal as to Count Three of the indictment as there was no proof to sustain a verdict of guilty in this count.

4. The Court erred by charging the jury, to-wit:

"You shall apply the same test to circumstantial evidence presented the same as any other evidence presented, direct or otherwise."

5. The Court erred in recalling the jury and re-charging the jury or elaborating on the original charge of the Court as to the various ways and means by which the jury could find the defendant, Davenport, and his co-defendant guilty.

The United States Court of Appeals for the Sixth Circuit entered an order on June 22, 1967, in which the judgment of the District Court, and the order overruling the motion for a new trial in that court was affirmed.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Was the petitioner denied a fair trial by repeated comments and intrusions by the Trial Judge?

The petitioner respectfully insists that prejudicial error was committed by the many comments and intrusions of the Trial Judge. These intrusions, though probably by chance rather than by design, are, or seem to be on, or tending to be on, the side of the government.

On one occasion when defendant's counsel was undertaking to cross-examine a witness, the following occurred:

> "THE COURT: Well, it would be the same if somebody hadn't changed them, Mr. Lane."

The petitioner contends that this was an unwarranted intrusion on the part of the trial judge, implying that somebody, probably the defendant, had done something wrong.

Shortly after this intrusion, the court commented, "Yes, but you don't have a title law down there; that is the reason we have so many car cases in this court from Alabama."

The petitioner contends that this comment was prejudicial, in that it put undue emphasis upon matters not rele-

vant to the case, but very definitely left the impression that the court is burdened with an evil which occurs frequently, and the jury could well have reasoned that there was a burden upon them as good citizens to do something about it, and the only way they could have done anything about it was to make an example of the defendants in this case.

Again the court said:

"THE COURT: Is that a photostat of the original that you got? That is what you really want to know, nobody is objecting, isn't it? Go ahead.

THE WITNESS: This is a photostat.

THE COURT: Of the original you got when you bought the car?

THE WITNESS: Yes, sir.

THE COURT: All right, we got it in the record."

This colloquy took place during the time the Assistant United States Attorney was examining a government witness. The petitioner contends that the statement "we got it in the record" tends to identify the trial judge with the government, since it occurred during government examination of a government witness.

A further intrusion was made as follows:

"THE COURT: Don't you think we had better quit and start again in the morning? Maybe you can find out what your witness brings down and go over it before you put him on the stand.

MR. WOODALL: I would like to, Your Honor.

THE COURT: I think that would be a good idea. Now, you can check those numbers out and be sure you have got it. These other items, are there any objections to those being made part of the record? They seem to relate to the car that was testified about.

MR. LANE: If Your Honor please, there are several pieces of paper here. All I can deem have any-

thing to do with this case are these right here. And if it is going to go to the jury I would object to these. These are notes.

THE COURT: Let them be marked for identification. I will take a look at them and rule on them in the morning.

MR. LANE: All right, sir."

The petitioner contends that a juror would not have to resort to an unreasonable imagination to have concluded from this conversation that the trial judge was affording assistance to the Assistant United States Attorney, in the presentment and clarification of his evidence.

The petitioner is quoting most of the testimony herein, of government witness, William Henry Poole:

"A. No, sir. No, sir. I never did.

Q. Never did. Did you ever see a 1962 Red Pontiac on Mr. Davenport's lot?

A. If I ever did I don't have any recollection of it.

Q. Do you have recollection of notarizing an assignment of title from a man named Felix M. Woods to another man named Fred T. Sims on October 16, 1964?

A. No, sir, I don't recall it. I saw a photostatic copy of that but I don't recall notarizing it.

Q. You take a look at that. That is your signature, isn't it?

A. That is my name all right.

Q. That is your signature, isn't it?

A. I would think I signed it, yes, sir.

Q. In fact, you signed Felix M. Woods on there, didn't you. That is also your handwriting?

A. Well, I won't say that. I don't know.

Q. Well, you have said it once before now. Is it or is it not? Did you sign Felix M. Woods on there?

A. I couldn't say that I signed it.

Q. Well, look at it. Is that your handwriting? Felix M. Woods?

A. By his mark there.

Q. By his mark?

A. That's right.

Q. So, it is customary when somebody comes in, for example, that can't write, you fix it up for them, don't you, so that it is legal?

A. Very seldom I have ever had one. I have done it a few times, yes, sir.

Q. When a man can't write you fix it up where the signature is correct on it, don't you?

A. Yes, sir.

Q. Don't you normally sign his name and he puts his mark—puts his mark, and he puts 'X' in there?

A. Yes, sir.

Q. Didn't you sign Felix M. Woods there so he could put his 'X'?

A. Looks very much like it.

Q. And looks like your name as notary, doesn't it?

A. But I can't recall the incident. It has been too long.

Q. I am not asking you to recall that incident.

MR. LANE: If Your Honor please, did the government call this witness as an adverse witness? This is cross-examination.

THE COURT: Getting pretty far along, Mr. Woodall. If you want to treat him as a hostile witness, I might let you do it.

MR. WOODALL: Well, Your Honor, I think there has been some surprise hereinsofar as this witness' testimony as to his prior testimony.

THE COURT: Well, go ahead and we'll see how it develops.

BY MR. WOODALL:

Q. Well, coming back to the Felix M. Woods, you are quite sure then that you signed that name?

A. Well, as I said, it looks like my handwriting.

Q. And you say it is very seldom that you get a man signed with an 'X'?

A. It doesn't happen very often.

Q. Yet, you have no recollection of that particular transaction?

A. Well, that far back date of that you wouldn't remember October, 1964. I notice the date.

Q. Well, do you know Felix Woods? Or Fred T. Sims?

A. No, sir.

Q. Don't know either of those gentlemen. Now, when someone comes in to have a paper notarized you ask them to provide identification, don't you?

A. Unless it is someone with them that I do know says they know them.

Q. Do you remember anyway has to be some sort of identification?

A. That's right.

Q. In your normal course of notarizing instruments?

A. (Witness did not respond.)

Q. Now, sir, coming back to 19—the time you went to work with Mr. Davenport there in '64, you are quite certain you didn't start with him around November, 1964?

A. Pretty sure that I didn't because cold, bad weather like that I don't try to work.

Q. I'm not saying that you worked there permanently beginning in November, 1964, but did you work sometime during November, 1964?

A. Pretty sure that I didn't.

Q. Well, sir, I've got a document here I would like to ask you to read it over and see if it refreshes your recollection.

MR. LANE: Your Honor, I would like to see that document.

MR. WOODALL: You can see it when he is through with it, Mr. Lane, if it is necessary.

THE COURT: Let him look at it.

THE WITNESS: Excuse me, I will have to wipe my glasses.

BY MR. WOODALL:

Q. Now, have you read that, sir?

A. Most of it.

Q. Do you remember what that is all about?

A. Yes, sir, I remember it.

Q. What is that about? When did this happen?

A. That was questions I was asked in the Grand Jury room.

Q. Does that refresh your recollection any?

A. I still don't believe I worked there any in November, latter part of '64.

Q. You don't deny testifying before the Grand Jury that you worked there since around November, 1964?

A. No, sir, but I could have been mistaken on the date. I don't believe I did unless somebody looked up the records and finds it, I don't believe I did.

Q. Well, you testified to the Grand Jury that you worked there in November, 1964, didn't you? You just read it.

A. Yes, sir, I read it.

Q. Do you or did you not testify that way?

A. Evidently, I did. I imagine the court reporter wrote it down the way I said it.

Q. I imagine he did, too. Do you remember this incident, now?

A. I remember being before the Grand Jury but I didn't keep any record of—

Q. (Interposing) Well, was that your testimony before the Grand Jury?

A. I think so.

Q. That you worked there since around November, 1964, on and off, more or less? You stated back there in November, 1964, except for the winter?

A. I didn't work all the winter.

Q. I'm not saying you worked all the winter. I'm saying did you start back in November, 1964?

A. I might have worked there a week or two in '64. I don't remember. I don't remember.

Q. Well, do you remember saying you did before the Grand Jury?

A. I know you have my statement, yes, sir.

Q. Well, do you remember it, sir?

A. No, sir.

Q. You don't remember testifying that before the Grand Jury?

A. I don't remember what I said. I remember going before the Grand Jury.

Q. All right, sir, we'll go on from there.

THE COURT: What is the date of this notarization of the Sims' statement.

MR. WOODALL: October. At least that is the date that appears on it.

THE COURT: Well, I know.

BY MR. WOODALL:

Q. Now, sir, let me ask you again if you recall whether or nor you ever remember seeing a red 1962 Pontiac on Mr. Davenport's car lot?

A. If I saw a '62 on it I have no recollection of it.

Q. Or maybe '61 or '62?

A. He might've had an older model. I don't know. Last time I was there my health was bad. I was sick and didn't pay too much attention to the stock. I didn't check them much. Whether he had a '62 I don't know it.

Q. Well, maybe '61?

A. Well, I really don't know whether he did or didn't.

Q. Let me ask you to look at this document again here and see if it refreshes your recollection. Do you remember that, sir?

A. Well, he had some red cars on the lot but I'm pretty sure he didn't have a '62 Pontiac, not while I was there.

Q. Well, do you remember testifying before the Grand Jury on April 21, 1965?

A. I didn't make a statement that it was a '62.

Q. I didn't say it was a '62. I said '61 or '62 red Pontiac, did you ever see it, '61 or '62, let me read you this, in response to a question, have you seen back about the time you went to work for Mr. Davenport, again did you see a '62 red Pontiac on his lot for sale at that time?

'Answer: '62 red Pontiac I'm pretty sure he had a red Pontiac, I wouldn't be positive about the model, you know. '61 or '62 unless you check it closely yourself. Look so much alike.'

Isn't that what you testified to before the Grand Jury?

A. I don't remember.

Q. You don't know?

A. I don't remember.

Q. Well, is this statement wrong?

THE COURT: I think you have made your point, Mr. Woodall, go ahead and let's get on something else.

THE WITNESS: Excuse me, Judge, throat is bad.

THE COURT: Yes, sir, your memory is too, apparently. Go ahead."

The petitioner further insists that the court's comment where witness Poole says: "Excuse me, Judge, throat is bad." And the court replied: "Yes, sir, your memory is too, apparently", is prejudicial error which, when combined with all the other comments and intrusions by the Court, compels a reversal.

Again, the Court commented to the United States Attorney that his point had been made. The court also asked the question of this government witness if he were telling

the truth when he testified before the Grand Jury and commented, "I permitted him to be treated as a hostile witness as obviously he was."

We contend that this comment conflicts with the presumption that all witnesses speak the truth and that the comment should not have been heard by the jury.

The petitioner relies upon the following authorities in support of his contention that he should have a new trial because of these comments and intrusions by the Court:

> "We do not say that a District Judge must ask no questions, and must never take an active part in the eliciting of testimony. It is certainly true, though, that a judge must not only be impartial and disinterested, but must also appear so.
>
> Finally, it is far better for the trial judge to err on the side of obstention from intervention in the case rather than on the side of active participation in it, especially where the major part, if not all of his interruptions and interventions, though by chance rather by design, are, or seem to be, on, or tending to be on, the side of the government."
>
> *Blumberg* v. *U. S.*, 222 F. 2d 496.
>
> "* * * a new trial will be granted where the judge's remarks inject into the case prejudicial matter not in evidence."
>
> 24 C.J.S., Criminal Law, §1440.
>
> "While the judge has an active role to play in the search for truth through the trial process, he must take great pains to avoid giving the jury an impression that he is partisan. Citing U. S. v. DeSisto, 289 F. 2d 833.
>
> *United States* v. *Persico*, 305 F. 2d 534.

"* * * We consider it unfortunate in the extreme that counsel chose to misstate the facts and attempt to place before the jury matters not in evidence. Citing United States v. Pepe, 247 F. 2d 838, 844.

United States v. *Persico, supra.*

"* * * It has many times been held that it is the duty of an appellate court to notice and correct said errors even though they were not challenged during the trial." See Lamento v. United States, 8 Cir., 4 F. 2d 901, 904; Benson v. United States, 5 Cir., 112 F. 2d 422, 423; Brasfield v. United States, 272 U.S. 448, 450, 7 S. Ct. 135, 71 L. Ed. 345; United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555.

Gomila v. *United States,* 146 F. 2d 372.

"* * * He" (the trial judge) "must not * * * usurp the function either of the jury or the representatives of the parties and must take care not to give the jury the impression of partisanship on either side."

United States v. *DeSisto,* 289 F. 2d 833.

"In a criminal trial, before a jury, the defendant holds a carefully guarded right to have his guilt or innocence adjudged by the jury. * * *" United States v. DeSisto, 289 F. 2d 833 (C.A. 2, 1961); United States v. Persico, 305 F. 2d 534 (C.A. 2, 1962). As was stated in Quercia v. United States, 289 U.S. 466, at page 470:

"* * * The influence of the trial judge on the jury 'is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; * * *"

U. S. v. *Ornstein,* No. 16,074, 6th Cir., decided 1/12/66.

The petitioner further relies upon the provisions of the Sixth Amendment to the Constitution of the United States, which entitles him to a public trial by an impartial jury. We contend the conduct of the Court in this case violated the spirit of that amendment.

For the foregoing reasons, the petitioner respectfully submits that the writ of certiorari should be granted in this case.

Respectfully submitted,

NORMAN D. LANE
DALE QUILLEN
Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

(Received for Entry United States District Court for the Middle District of Tennessee, Nashville Division, June 14, 1966.)

UNITED STATES OF AMERICA vs. DALTON COX REUBEN DAVENPORT	Criminal No. 13,810

Order

This cause came on to be heard on June 14, 1966, for hearing on the motion for a new trial filed by the defendants, Reuben Davenport and Dalton Cox. The defendants, Reuben Davenport and Dalton Cox appeared in person and by their attorneys, Sam Wallace and Norman Lane. The government was represented by Assistant United States Attorney, Larimore Burton, Jr.

After hearing the argument of counsel in regard to the motions for a new trial the Court ruled that the motions were not well taken and therefore ORDERED that said motions be and the same hereby are denied.

THEREUPON THE COURT ORDERED that execution of sentence as to Reuben Davenport and Dalton Cox be suspended until August 1, 1966; or if a notice of appeal is filed within the proper time as provided by the Federal Rules of Criminal Procedure then execution of sentence shall be further suspended until the appeal is resolved.

IT IS FURTHER ORDERED that the defendants, Reuben Davenport and Dalton Cox be allowed to remain on their same bond pending final disposition of the case.

/s/ Frank Gray, Jr.
United States District Judge

APPROVED FOR ENTRY:
Gilbert S. Merritt, Jr.
United States Attorney
Larimore Burton, Jr.
Asst. United States Attorney

APPENDIX B

No. 17,436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed in the United States District Court, June 22, 1967.)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
REUBEN L. DAVENPORT,
Defendant-Appellant.
Decided June 22, 1967

} Appeal from the United States District Court for the Middle District of Tennessee

Before: PHILLIPS, CELEBREZZE and COMBS, Circuit Judges.

Defendant-appellant was found guilty by a jury on two counts of an indictment for concealing and selling a stolen automobile transported in interstate commerce. 28 U.S.C. Section 2313. He appeals from the judgment sentencing him to one year and six months on each count, the sentences to run concurrently.

The sole ground of appeal is that the District Judge made improper and prejudicial comments before the jury in the course of the trial.

We have read all of the comments made by the District Judge appearing in the record and do not consider them prejudicial to the defendant-appellant.

It is noted that the jury was admonished by the Judge not to consider any statement made by him during the trial as reflecting his opinion on the question of the guilt or innocence of the defendant.

It is noted also that there was no objection by defendant-appellant's employed counsel to any comment made by the District Judge during the trial.

The judgment of the District Court is affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 541

REUBEN L. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Middle District of Tennessee on two counts of concealing and selling a stolen motor vehicle transported in interstate commerce in violation of 28 U.S.C. 2313, and was sentenced to one and one-half years on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. B).

The judgment of the court of appeals was entered on June 22, 1967. On July 22, 1967, Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 21, 1967. However, the petition was not filed until August 28, 1967, and it is therefore out of time under Rule 22(2) of the Rules of this

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Court. In any event, petitioner presents no issue warranting review by this Court. His sole contention is that certain comments of the trial judge constituted reversible error; considered in the context of the three-day trial during which they were uttered, the comments in question—none of which was objected to at trial by petitioner's counsel—did not require reversal of the conviction.

The first four comments quoted in the petition (Pet. 4–6) were made while government witnesses were proving the chain of title of the stolen vehicle (G.A. 1b–10b).[1] The testimony on this point was somewhat involved, since early in the chain a clerical error had been made in transferring the vehicle identification number from the automobile to the title papers. The remarks of the trial judge were directed simply at clarifying this rather complicated testimony for the jury. The court was not aligning itself with the government when it suggested that the Assistant United States Attorney had better quit and start again in the morning. The witness on the stand was discovered to have been testifying from the wrong papers. The suggestion was made for the purpose of allowing the witness to procure the correct documents so that the government's evidence could be presented to the jury in a clear and concise manner.

The other remarks (Pet. 11–12) were made during direct examination of a government witness, William Poole. Although he had testified before the grand

[1] "G.A." refers to the appendix of the government's brief in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

jury approximately one year before, at trial he professed inability to recall any of the facts. Even reading the grand jury testimony failed to refresh his recollection. In these circumstances, the court was justified in permitting the government to treat Poole as a hostile witness (Pet. 7, 12). Poole's answers also warranted the court's comment that his memory was bad—a fact readily apparent to the jury. We note, finally, that the judge admonished the jury not to consider any statement made by him as reflecting his opinion on guilt or innocence (Pet. App. 3).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967